

MEMORANDUM

TO: The Commission

FROM: Erin O'Connell-Diaz & Phillip A. Casey
Administrative Law Judges

DATE: September 18, 2001

SUBJECT: Commonwealth Edison Company

Petition for approval of delivery services tariffs and tariff revisions and of residential delivery services implementation plan and for approval of certain other amendments and additions to its rates, terms, and conditions.

Briefing on Rulings

On September 13, 2001, the ALJs conducted a motion call. The ALJs heard motions relative to the requests for proprietary treatment, motions to strike testimony, motions to compel and a motion to extend the testimony schedule. During the Motion call the ALJ's received a request from Commissioner Harvill to report to the Commission their justification for any and all ruling made. Additionally, the ALJ's were asked to reference any rule, statute, or fact that was used to arrive at each and every ruling. Below, please find a summary of actions taken by the ALJs at the motion call on September 13, 2001.

A motion filed by Commonwealth Edison to extend the time for filing of testimony was continued until September 18, 2001, to determine the amount of additional time needed to file testimony. The Company cited the recent terrorism act against the United States and the inability of its witnesses to travel as a cause for it's delay in being able to file rebuttal testimony. At the time of the hearing it was not clear as to when public air transportation would resume. As such, the motion was continued by the ALJ's so that the parties could report back to the ALJ's regarding the status of their witnesses ability to secure air travel.

A motion filed by Commonwealth Edison to Strike Testimony was withdrawn.

Cook County's Motion to Strike Testimony was denied. Cook County sought to strike the testimony of certain Commonwealth Edison Company witnesses. Specifically the County sought to strike the testimony of those witness discussing rate of return and investor perceived risks in a restructured electric marketplace. The County argued that the testimony is beyond the scope of the proceedings. The ALJs determined that the

testimony should not be stricken and that any substantive deficiencies in the proffered testimony, if any, can be addressed in rebuttal. 83 Ill. Admin. Code Sec. 200.500 Authority of Hearing Examiner, to rule on all objections, motion and petitions..., 83 Ill. Admin. Code Sec. 200.25(a) Standards of Discretion, principal goal of the hearing process is to assemble a complete factual record to serve as a basis for a correct and legally sustainable decision.

ARES Motion to Compel certain data requests made August 3, 2001 was continued to September 18, 2001.

Confidential and Confidential or Proprietary Treatment Ruling.

Neither the Illinois courts nor the Commission has established a single “standard” that determines when information should be designated for confidential treatment under a protective order. The Supreme Court of Illinois determined that the question of whether particular information should be made subject to a protective order is left to the discretion of the trial court. Skolnick v. Alzheimer & Gray, 191 Ill. 2d 214, 223-24, 730 N.E. 2d 4, 12 (2000). The Illinois Public Utilities Act (“the Act”) Section 5-404 (220 ILCS 5/404) mandates that the “Commission shall provide adequate protection for confidential and proprietary information ...”(emphasis added). Further, the Commission’s rule, 83 Ill. Admin. Code Section 200.430 concerning protective orders – provides that ALJs “may” enter protective order to protect certain types of information – and that the designation of information as confidential under a protective order is a matter for the ALJ’s discretion.

The standards set by the courts focus on the harm that would result if the information were to be disclosed. One Illinois Court has held that business information should be protected by a protective order if its disclosure would cause the “erosion” of a litigant’s “bargaining position” with third parties. May Centers, Inc. v. S.G. Adams Printing and Stationery Co., 153 Ill. App. 3d 1018, 1022, 506 N.E. 2d 691, 695 (5th Dist. 1987). Courts in other jurisdictions have observed that business information should be made subject to a protective order if its disclosure would cause “competitive disadvantage,” Nestle Foods Corp. v. Aetna Casualty & Surety Co., 129 F.R.D. 483, 484 (D. N.J. 1990), or a “clearly defined and very serious injury,” Bank of New York v. Meridien Biao Bank Tanzania Ltd., 171 F.R.D. 135, 143 (S.D.N.Y. 1997), to the party whose information is at issue.

In support of its position for a blanket prohibition of any documents being afforded confidential treatment GCI cites Cass Long Distance Services, Inc., ICC Docket No. 98-0060 (Reopen), 1999 Ill. PUC LEXIS 206 (Order, March 10, 1999). Our review of that decision demonstrates that this case has absolutely no applicability to the instant matter. Notably, Cass involved an entirely different situation than this case -- namely, whether an annual report statutorily required to be filed with the Commission, and that which contained the same information the utility had already filed with the United States Department of Agriculture in a public report, should be protected from

public disclosure. In the context of that case, the designation of whether the report should be designated as confidential was governed by the provisions of the Illinois Freedom of Information Act ("FOIA") and its federal counterpart, and the legal standards that have developed under those statutes. The FOIA rules that govern the confidentiality of reports filed with the Commission that were at issue in Cass and similar public government documents simply are not applicable here. In the case at bar, ComEd is not requesting confidential treatment under the FOIA, as did the movant in Cass. Further, the documents sought to be designated confidential by ComEd are private company documents not public records, hence FOIA would be inapplicable.

The FOIA standard applied in Cass applied to one type of information that can be made subject to protective orders – confidential business or trade secret information. However, numerous other types of information require protection in Commission proceedings. For example, if the Cass standard were controlling, there would be no confidentiality for protection afforded to the drawings of ComEd's distribution system. For obvious public safety concerns these documents must be maintained in a confidential manner in order to maintain the safe operation of the system.

In fact, courts have held on several occasions that the rules developed under FOIA are distinct from the rules concerning the disclosure of information that apply in the litigation context, and that rules in one context do not apply to the other. For example, the United States Supreme Court has held that "FOIA was not intended to supplement or displace rules of discovery" that apply in civil litigation. John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1990). Given the legal standards as set forth above the ALJ's overruled GCI's blanket objection.

We would again note and stress to the Commission that the designation of information as Proprietary and Confidential does not prevent parties from using this information for the purposes of litigating the issues in this case. It does however prevent the dissemination of this information to parties who have not agreed to the terms nor executed the Protective Order in this case. Below please find a listing of each document that the Company sought Confidential or Confidential and Proprietary treatment which were objected to by various parties. Where a ruling has been made, the ALJs have provided the corresponding authority for such ruling. Additionally, since September 13, 2001, additional requests for confidential treatment have been filed and are subject to review by the ALJs at future motion calls.

EOD/PAC:fs

Commonwealth Edison Company's Motion for Treatment of Documents as Confidential or Confidential and Proprietary:

Response to Staff

Bates range 4933-4934	reserve ruling
Bates range 4936-4937	reserve ruling

Response to Midwest Generation

Bates range MWG 7-39, 1040-1282	reserve ruling
Bates range MWGE 1-33	granted, objection withdrawn.
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691

Response to Attorney General/GCI 1.01, 1.10, 1.13, 1.26, 1.28, 1.31, 1.32, 1.35, , 1.37, and 1.41

Bates range AG 0000055-56	granted
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691
Bates range AG 0001094-1101	granted
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691
Bates range AG 0001171	reserve ruling, ALJs to review un-redacted copy
attorney-client privilege asserted	
Bates range AG 0001383	withdrawn
Bates range AG 0001384-1385	granted
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691
Bates range AG 0001388	granted, no objection
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691
Bates range AG 0001389-1390	reserve ruling, ALJs to review part 411
Bates range AG 0001391-1392	granted, no objection
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691
Bates range AG 0001393	withdrawn
Bates range AG 0001394-1423	granted, with revisions.
Authority:	83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691
Company instructed to de-designate budget data which pertains to calendar years prior to 2000.	
Bates range AG 0001509-1510	reserve ruling, ALJs to review documents before ruling
attorney – client privilege asserted	

Bates range AG 0001552 redactions were appropriate, the remainder of the document will be made public
 Authority: 83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691

Bates range AG 0001663, Bates range AG 0001665, Bates range AG 0001927-1929, Bates range AG 0004234-4238, Bates range AG 0004280, Bates range AG 0004311, Bates range AG 0004321, Bates range AG 0004412, Bates range AG 0004415, Bates range AG 0004740-4741, Bates range AG 0004744, Bates range AG 0004774-4779, Bates range AG 0004850, Bates range AG 0004895, Bates range AG 0004897, Bates range AG 0005470-5472, Bates range AG 0012047-12048, Bates range AG 0012054-12055, continued to September 18, 2001, on request of AG. AG delivered its only copy to its expert and therefore was unable to participate in the September 13, 2001, hearing in a meaningful way. Company will provide AG with another copy by Friday, September 14, 2001.

City

Responses to 1.010 –1.011 denied
 Authority: 83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691

Sought confidential treatment due to high cost for actuarial studies

Response to 2.138(a) denied
 Authority: 83 Ill. Admin Code Sec. 200.430, 730 N.E. 2d 4, 506 N.E. 2d 691

Response to 2.138(b) withdrawn

Response to 2.151(a) reserve ruling

ARES

Responses to 1.19b(3) and 1.19b(6) continued to September 18, 2001 by agreement.